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The American
Antitrust Institute

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

William F. Caton, Acting Secretary
Federal Communications Commission
Office of the Secretary
445 12th Street, SW
Room TW-204B
Washington, DC 20554

Filed electronically to http://www.fcc.gov/e-file/ecfs.html
RE: CS Docket No. 01-348 /

Dear Mr. Secretary:

The American Antitrust Institute urges the Federal Communications Commission to deny the transfer of licenses and authorizations held by Hughes Electronics Corporation ("Hughes") and its subsidiaries and affiliates and by EchoStar Communications Corporation ("ECC") and its subsidiaries and affiliates (collectively, the "Applicants") to the "new" EchoStar Communications Corporation.

The American Antitrust Institute is an independent education, research, and advocacy organization, that supports a vigorous role for antitrust in the national economy. See www.antitrustinstitute.org for details.

We believe the joinder of the nation's #1 and #2 satellite TV providers would violate the antitrust laws. Indeed, this thought was apparently shared by EchoStar until recently. In 2000, there was an antitrust case pending in a federal court in Colorado, *EchoStar Communications Corp. et al. v. DirecTV Enterprises, Inc., et al.,* in which EchoStar claimed that DirecTV had illegally precluded competition on the merits in the market for high-power direct broadcast satellite ("DBS") television and equipment. Paragraph 76 of the amended complaint defined the relevant antitrust market as the "High-Power DBS Market," which subsequent paragraphs described as dominated by DirecTV and constrained by extremely high barriers to entry. This lawsuit was voluntarily dismissed by the parties in November 2001, with prejudice.

In the meantime, EchoStar had entered the battle to acquire DirecTV, with its sympathizers arguing that this would not be a merger to monopoly, because the relevant market also includes cable TV. They are probably right about the relevant market, but certainly wrong in implying that this ends the antitrust inquiry.

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The issue turns to competition between cable TV and satellite TV. According to the FCC's Annual Report in January 2001, "DBS is the principal competitor to cable television service." Not only does DBS moderate cable prices, but it is also the main source of pressure on cable to expand channel capacity. DBS subscribers now represent over 15% of all multichannel video programming distributor ("MVPD") subscribers. There are currently many different cable companies (the top ten have close to 90 percent of all U.S. cable subscribers, but the recent Comcast bid for AT&T's cable business is predicted to set off a wave of consolidation). In most geographic markets, however, one company has a monopoly. ("Overbuild" competition has the ability to serve only 18.5 million homes, whereas cable passes 97 million.)

DBS is growing much faster than cable. Whereas cable grew by about 1 percent from 1999 to 2000, DBS expanded at a rate of over 28 percent, spurred on by a change in the law that now allows DBS to present local and network affiliate signals. The FCC Report describes DirecTV as the nation's leading DBS service, with over 8.7 million subscribers (now reported to be 10.3 million), and EchoStar (with a recent growth of 65%) as having 4.3 million subscribers (now estimated at 6.4 million). A third company, Dominion, operates a niche family-oriented service with fewer than 1 million subscribers, using an EchoStar satellite.

For most of the markets in this country, a merger of DirecTV and EchoStar would reduce competition from three companies (one cable, two satellite) to a duopoly. In the approximately 330 communities where there is cable overbuild, the merger might reduce competition from four to three, rather than three to two. In rural areas that are not served by cable, the result would be a single provider of TV programming. (Depending on how you measure, this would place between 3.4 percent and 19 percent of the population under monopoly conditions.)

The situation is similar to that of the proposed Heinz-Beechnut baby food merger, only much worse. There, a successful merger would have brought the industry from three competitors to two. Heinz and Beechnut argued that neither was doing very well and that they were rarely competing on the shelf in the same store. Together, they projected, they could compete more effectively against the dominant baby food company, Gerber. But the Court of Appeals of the District of Columbia said there is a very high burden on a three-to-two merger, and the parties had not demonstrated such overwhelming efficiencies as to justify the loss of competition. Here, there is no argument that either EchoStar or DirecTV is a weak competitor, and no argument that they rarely compete against each other. But, they say, only a single satellite company can provide formidable competition to cable monopolists. You'd think it was cable that was growing at the rapid rate!

Let us assume for the moment that a single DBS has a lower marginal cost of delivering programming than a cable competitor. If there is only one DBS, it can do well by merely setting its price a little below the cable's, protected from the rain of aggressive price competition by the cable's monopoly umbrella. If there are two DBS competitors, not only will they be more likely to keep each other's pricing competitive, but their competition against one another is likely to pull down cable's price further than one DBS alone. And, in an industry where future technological improvement seems likely, there is probably an enormous dynamic efficiency in keeping the DBS companies pitted against each other.

Of particular concern is the problem of rural America, where the issue is not duopoly but perfect monopoly. EchoStar's supporters suggest that rural rates could be regulated to reflect the rates charged in competitive markets, positing a national price. It seems, strange, however, to create a regulatory regime, a second-best solution, when a competitive regime already exists. Antitrust generally disapproves of such solutions because they require continual monitoring and simply because any merger (even a merger to perfect monopoly) can be fixed as to its pricing by mandating that prices be set in some artificial manner. To do this, however, means to deviate from the efficiency goal of antitrust. Take EchoStar's proposal to create a national price. How will a company with a national price compete against cable companies in dramatically different economic environments across the country? Will there be allocational efficiency when prices ignore local and regional competition? How much price competition will there be when cable companies know their only competitor has a set price? And what makes us believe that the national price will not incorporate a large element of monopoly pricing based in the rural areas?

But this focus on pricing masks a fundamental flaw in the logic of EchoStar's solution. Price is not the only benefit of competition. Even if the price is right, to whom is the rural customer supposed to turn when he believes the monopolist's service stinks?

It is going to take one whale of a good story to convince the public that this merger is pro-competitive.

Sincerely,

Albert A. Foer

Albert A. Foer, President